

Letter of Appeal
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

Via Fax: (973) 599-6542

RE: Commitment Adjustment (COMAD) Appeal

This letter appeals the Schools and Libraries Division (SLD) decision to seek a COMAD from IBM Corporation. The COMAD decision was communicated to IBM via letter dated May 13, 2004, subject: Recovery of Erroneously Disbursed Funds. The following information applies to this COMAD Appeal:

Funding Year: 2000-2001
Form 471 Application Number: 179273
Funding Request Number: 379524
Applicant Name: Ysleta Independent School District
Billed Entity Number: 142115
Service Provider: IBM Corporation
SPIN: 143005607
Billing Account Number: 20-1206-052CSP
Funds to be recovered: \$208,990.80

IBM Corporation is appealing this COMAD decision to SLD rather than the FCC because we believe SLD made an error in fact in arriving at their decision. The explanation for the recovery of funds, as stated in the COMAD letter, was that items funded through the E-rate program were "not being used for educational purposes. During an audit it was noted that 37 routers were in storage and not being used."

In their response to the audit finding, Ysleta Independent School District (YISD) acknowledged that the routers in accordance with their long-range technology implementation had been withdrawn from use temporarily but were scheduled to be reinstalled in other locations pending the outcome of their Year 5 E-rate application. (At the time of the audit in 2003, this application had yet to be decided by the SLD.) The YISD explanation is thorough and clear as to what they were trying to achieve, and is compelling as a technology implementation strategy. USAC may not understand or necessarily agree with the technical strategy undertaken by YISD, but that does not mean any rule violates occurred.

There appears to be an implication in the audit and the COMAD that the routers were not installed. The routers in question were installed by IBM between October 22, 2001 and November, 2001, configured, and in full operation by the end of November, 2001. IBM fulfilled its obligations under the contract with YISD, was paid for those services, and all work performed was clearly within E-rate rules.

The audit faults YISD for subsequently removing the routers in question from their network and placing them temporarily in storage pending other technical changes to their network. There was no rule in effect that would make the action by YISD a violation of E-rate rules.

The rules requiring equipment to be used in the location for which it was approved did not take effect until March 11, 2004 – the effective date of FCC 03-323, Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6. In addition, the audit finding itself reads, “USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used.” We maintain that seeking a COMAD on these grounds is unjustifiable and a misapplication of the rules in effect at the time of both the action by YISD and the audit.

The COMAD seeks recovery of funds apparently based on auditors opinion in Finding 5 of the audit which states: “However, using the routers for such a limited time **would tend to indicate** poor controls over the implementation of technology products purchased with E-rate funds, and **could also be viewed** as a waste of USAC funds.” (Emphasis added.) We do not believe that “tending to indicate” and “could also be viewed” are rational or reasonable criteria for seeking a commitment adjustment. The audit found no violations of E-rate rules and rendered a tenuous finding that was more than adequately addressed by the YISD response.

Information posted on the SLD web site states that funds disbursed in error may be recovered when the error is discovered during periodic reviews such as audits. The SLD web site lists several examples:

- “Services billed but were not delivered
- Services were billed in excess of the services delivered
- Services were returned, but an appropriate refund to SLD was not made”

If the criteria for a COMAD is recovery of monies disbursed in error, this situation does not meet that criteria. E-rate funds were disbursed correctly IAW with program rules. YISD made a bona fide request for funds and received a funding commitment. Subsequent to the funding commitment, IBM performed installation and configuration of the routers and turned them over to YISD in accordance with the IBM contract with YISD. There is no evidence or indication in the USAC audit that funds were not disbursed correctly.

In summary, it is IBM’s assertion that funds were disbursed correctly and that an error of fact was made by USAC in making this COMAD decision. The routers in question were installed and configured in accordance with a valid contract between IBM and YISD, and in accordance with program rules. Although YISD removed them temporarily from its network, there was no rule in being at the time to prohibit such actions by YISD. Finally, the audit provides no evidence to support wrongdoing by YISD. The audit itself is very imprecise using the terms “would tend to indicate” and “could also be viewed”; however, such terms clearly do not constitute evidence of rule violations.

Based on the above, IBM requests USAC grant its appeal and reverse the decision to seek recovery of erroneously disbursed funds in this case.

If further information is required, please contact me at 972-280-5357.

Sincerely,

David B. Brown
IBM Staff Counsel